

FCC MAIL SERVICE

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
)  
Applications for Consent to the Transfer of )  
Control of Licenses and Section 214 )  
Authorizations by Time Warner Inc. and America )  
Online, Inc., Transferors, to AOL Time Warner )  
Inc., Transferee )  
)  
Petition of AOL Time Warner Inc. for Relief )  
From the Condition Restricting Streaming Video )  
AIHS )

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CS Docket No. 00-30

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 2003

Released: August 20, 2003

By the Commission: Chairman Powell issuing a separate statement; Commissioners Copps and Adelstein dissenting and issuing a joint statement.

I. INTRODUCTION

1. In the captioned proceeding, the Commission approved certain license transfers attendant to the merger of Time Warner Inc. and America Online, Inc.<sup>1</sup> As a part of that approval, the Commission imposed a condition relating to the provision of advanced instant messaging-based high-speed video services by AOL Time Warner. AOL Time Warner has now requested the elimination of this condition, pursuant to procedures specified in the Order.<sup>2</sup> Public comment on the petition was solicited,<sup>3</sup> and responsive comments were received from Gerald R. Faulhaber and David J. Farber, filing jointly, who urge the Commission "to proceed cautiously,"<sup>4</sup> and from an individual, Dana-Renee Lee who, in a very brief comment, suggests a requirement, clearly beyond the scope of this proceeding, that all IM providers be compatible. MCI filed a reply comment supporting elimination of the condition and arguing that it should not have been imposed in the first place. BellSouth Corporation/BellSouth Telecommunications, Inc. filed a reply comment supporting denial of the petition. AOL Time Warner filed a reply to the initial comments. For the reasons stated below, we grant the petition and remove the condition.

<sup>1</sup> *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc and America Online, Inc, Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547 (2001) (Order).

<sup>2</sup> AOL Time Warner Inc., *Petition for Removal of the Condition Restricting Its Provision of Advanced Instant Messaging-Based High-Speed Services (AIHS)*, CS Docket No. 00-30 (filed Apr. 2, 2003) (Petition).

<sup>3</sup> Public Notice, DA 03-1092 (rel Apr. 4, 2003).

<sup>4</sup> As is noted in their comment, Professors Faulhaber and Farber were on the staff of the Commission during consideration of the merger and advised Commission members and staff with respect to it.

## II. THE CONDITION

2 Broadly speaking, the concern addressed by the Commission in the merger proceedings was that AOL's market dominance in text-based messaging, coupled with Time Warner's transmission assets and programming content, would result in the combined firm dominating the advanced IM-based high-speed services market. This, it was believed, would deprive the public of the benefits of interoperability and the efficiencies and potential for innovation associated with interoperability

3. The condition in question reads as follows

AOL Time Warner shall not offer an AIHS [advanced instant messaging-based high-speed service] application that includes the transmission and reception, utilizing an NPD over the Internet Protocol path of AOL Time Warner broadband facilities, of one- or two-way streaming video communication using IM protocols – including live images, tape or animation – that are new features, functions, and enhancements beyond those offered in AIM 4.3 or ICQ 2000b, until AOL Time Warner satisfies one of three options (the "IM condition"). The three options are: (1) AOL Time Warner may show that it has implemented a standard for server-to-server interoperability of NPD-based services that has been promulgated by the IETF or a widely recognized standard-setting body; (2) AOL may show that it has entered into a written contract providing for server-to-server interoperability with a significant, unaffiliated, actual or potential competing provider of NPD-based services offered to the public; after AOL Time Warner has entered this contract, an officer of AOL Time Warner shall certify to the Commission that it is prepared to promptly enter into negotiations, in good faith, with any other requesting provider of NPD-based services; within 180 days after entering this first contract, AOL Time Warner must enter two additional contracts with significant, unaffiliated, actual or potential competing providers of NPD-based services offered to the public; (3) AOL Time Warner may seek relief from this condition by showing that the imposition of the condition no longer serves the public interest, convenience or necessity because there has been a material change in circumstance.<sup>5</sup>

4. For purposes of this condition, IM service refers to an online Internet service that has the capability to detect whether other users of the system are present online at a given time and to exchange messages with them in real time. The "NPD" or "Names and Presence Database" is the subscriber username database file where the names of those present online at a given time are kept. "AIHS" or "advanced IM-based high-speed service" is defined, by way of example, as an IM-based application that takes advantage of high-speed Internet access, such as video conferencing or streaming video communications. "IETF" is the Internet Engineering Task Force, a body that is involved in setting standards relating to the Internet. "AIM 4.3" and "ICQ 2000b" are proprietary AOL Time Warner instant messaging protocols.

5. The Commission specified that AOL Time Warner could seek to have this condition eliminated by providing "clear and convincing evidence" that the condition no longer is necessary in the public interest, convenience, and necessity because of a material change of circumstance, including new evidence that renders the condition unnecessary.<sup>6</sup> Any market share information proffered as evidence

<sup>5</sup> Order, 16 FCC Rcd at 6679 ¶ 325 (footnotes omitted).

<sup>6</sup> Order, 16 FCC Rcd at 6628 ¶¶ 195, 196

that the condition no longer is necessary was required to demonstrate that AOL Time Warner had not been a dominant provider of NPD based IM services for at least four consecutive months. In the absence of any earlier termination, the condition expires by its own terms on January 22, 2006.<sup>7</sup>

### III. DISCUSSION

6. In its Petition, AOL Time Warner provides evidence, including market share data, of a material change of circumstance in market conditions from the time the *Order* was released to demonstrate that it has not been a dominant provider of NPD text-based IM services for at least four consecutive months. Based on information obtained from comScore Media Metrix, a firm that measures Internet and digital media use,<sup>8</sup> AOL's market share is shown to have been 100% as recently as June 1999.<sup>9</sup> For the four months prior to the filing of the current petition, Media Metrix reports AOL Time Warner's market share as 59.5%, 58.5%, 57.6%, and 58.5% for November 2002, December 2002, January 2003, and February 2003, respectively, a decline for AOL from 75.3% in March 2000 and 61.5% in December 2000, shortly before the *Order* was released.<sup>10</sup> AOL's two major IM competitors, Microsoft and Yahoo!, have averaged 22.2% and 19.3% market shares, respectively, over that same period, an increase from 10.7% and 14% in October 2000.<sup>11</sup> The Media Metrix data show a slow general decline in the number of unduplicated unique visitors to AOL's IM services from 52,120,000 in October 2002 to 50,965,000 in February 2003 (a 2% decrease), while MSN Messenger's number increased from 17,640,000 to 19,410,000 (a 10% increase) and Yahoo! Messenger's number increased from 16,138,000 to 16,802,000 (a 4% increase).<sup>12</sup> We note that the trend in market shares is inconsistent with the market "tipping" concerns expressed in the *Order*.<sup>13</sup> In particular, if a market is subject to tipping and the subsequent dominance of the largest firm, then as the overall market grows, we should see an increase in the largest firm's market share or at least an increase in the largest firm's number of users. In fact, the data show the opposite trend; the smaller firms are consistently growing at the expense of AOL Time Warner as the market grows

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<sup>7</sup> *Order*, 16 FCC Rcd at 6629 ¶ 200.

<sup>8</sup> Petition at 11, Petition, Rogerson Affidavit at 5. The Media Metrix data track usage data of AOL IM, AIM, ICQ, MSN Messenger, and Yahoo! Messenger. AOL Time Warner claims that this data set likely understates AOL's market share because it fails to include comparable data for other IM services in the market. Petition at 11, n.40. The data set covers the 36 month period from March 2000 to February 2003 and reports the number of users of each IM service on a monthly basis based on a sample of households. Rogerson Affidavit at 5.

<sup>9</sup> Petition at 11-12. AOL's proprietary IM services, AIM and ICQ, were the only significant IM services available prior to June 1999. Petition at 12, n.42. Yahoo! Messenger launched on June 21, 1999, and MSN Messenger launched on July 22, 1999. Petition, Rogerson Affidavit at 10, n.12.

<sup>10</sup> Petition, Rogerson Affidavit, Table 2 at 8.

<sup>11</sup> *Id*.

<sup>12</sup> Petition at 12. AOL notes that the Media Metrix IM usage data methodology has become more precise since the release of the *Order* because, as of October 2002, among other things, it now counts only those IM users who send or receive at least one instant message that month. Petition at 12, n.42, Petition, Rogerson Affidavit at 5-6, nn 7-8.

<sup>13</sup> *Order*, 16 FCC Rcd at 6628 ¶¶ 153-157.

7. Faulhaber, Farber, and BellSouth do not directly dispute these statistics. Faulhaber and Farber acknowledge the decline in AOL's market share, but characterize the decline as slow, arguing that AOL still dominates the IM market with a 58.5% market share.<sup>14</sup> Further, Faulhaber and Farber contend that the IM market is not mature such that market share data are not determinative of whether the IM market has tipped, *i.e.*, there remains a potential for AOL to monopolize new IM-based services because of its dominance in the text-based IM market.<sup>15</sup> At the same time, however, they acknowledge that the presence of two stable competitors to AOL's IM service suggests that market tipping is less of a danger today than at the time the *Order* was released.<sup>16</sup>

8. We view this development of stable competitors as an indication that the market is maturing and stabilizing. This undermines Faulhaber's and Farber's primary claim that, because the market is immature, AOL's market share does not alleviate its dominance or the likelihood that it will tip the market and thus cannot be the sole determinant of dominance.<sup>17</sup> From the available data, it is clear that AOL's market share experienced a precipitous decline from June 1999 to December 2000, followed by a slow but steady decline to the present. The IM market itself is growing rapidly, but at a declining rate of increase, indicating a move away from the rapid growth that marks an immature market, and lowering the chance that the largest participant will be able to use a rapid influx of new IM users to gain dominance within the market. While we cannot say with complete certainty that the market has matured to the point that market shares will remain stable, the continuing success of Microsoft and Yahoo! indicates that AOL Time Warner cannot control entry or survival in the market. Indeed, in contrast to the tipping hypothesis, the trends in the market (with AOL Time Warner's share shrinking in an expanding market, but Microsoft's and Yahoo!'s increasing) show more risk to AOL Time Warner's position in the market than to that of its rivals.

9. Faulhaber and Farber also argue that the data relied upon in the AOL Time Warner Petition do not take into account market segments, in particular the emerging IM business market, when analyzing the relevant market shares.<sup>18</sup> Because the business market did not exist at the time of the *Order* and network effects are not as important for business IM implications used primarily for internal communications, Faulhaber and Farber contend that the relevant market for dominance analysis should be the consumer market.<sup>19</sup> Although Faulhaber and Farber characterize business as a "significant" IM customer,<sup>20</sup> the data provided in the record from Media Metrix are only aggregate market share data and are not broken down into separate business and consumer markets. Farber and Faulhaber provide no additional data, and therefore we have no means to evaluate their claim.

10. BellSouth contends that AOL Time Warner's reliance on market share data is flawed because many of the alleged users of competing IM providers are also AOL IM users who, as a result of

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<sup>14</sup> Faulhaber and Farber Comments at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 3.

<sup>17</sup> Faulhaber and Farber Comments at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

AOL's failure to interoperate, are forced to use the services of multiple IM providers in order to communicate with the users of the competing IM providers.<sup>21</sup> BellSouth states that this overlap, which is based on the Forrester Report's finding that 20% of AOL users have another IM service, impacts at least half of the market share numbers attributed to AOL's competitors and thereby unfairly inflates the competitors' market share data relied on in the AOL Time Warner Petition.<sup>22</sup> We do not find this argument to be persuasive, because it is ambiguous both with respect to its implications for estimating market share and with respect to its policy implications. For example, in those markets such as typewriters, VCRs, or computers, where tipping has occurred with resulting emergence of a dominant firm or platform, each consumer typically purchases one product exclusively and then is "locked in" to that platform by the purchase.<sup>23</sup> The fact that so many consumers are willing to use multiple platforms in this case suggests that consumer lock-in is not a concern here, which further ameliorates our concerns about the market tipping

11. Further, we find persuasive AOL Time Warner's argument that because the other two large IM providers, Microsoft and Yahoo!, have not chosen to interoperate with each other, these providers must believe that the market is competitive and that their own market presence is strong enough for the market to remain competitive. Faulhaber and Farber indicate that failure to interoperate can only represent a strategic decision by a firm that is strong enough to cause tipping.<sup>24</sup> We do not agree that this theory provides a sound basis for retaining the existing condition. At the outset, it is not clear that AOL Time Warner has made any such strategic decision. Indeed, it has recently stated in conjunction with the settlement of certain litigation with Microsoft that "[t]he two companies have agreed to explore ways to establish interoperability between AOL and MSN Instant Messenger networks in a manner that will protect consumer privacy, security, and network performance."<sup>25</sup> Although Faulhaber and Farber attempt to downplay its importance, they also note the changed conditions reflected in the emergence of the Trillian interoperability application, which can supply "as if" interoperability among the three leading IM providers.<sup>26</sup> This development, they recognize, suggests that a regulatory mandate for IM interoperability is less important today than it was at the time of the merger. At present, it appears that market-based initiatives, such as the Microsoft-AOL Time Warner agreement, the Trillian application, and IM interoperability initiatives before the Internet Engineering Task Force,<sup>27</sup> demonstrate positive momentum toward achieving interoperability.

12. Moreover, we conclude that removal of the IM condition will likely provide public interest benefits. The Commission has continually recognized competition as an important policy

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<sup>21</sup> BellSouth Comments at 3-4, n.6 (citing Charles S. Golvin, Chris Charron & Alanna Denton, "This is Not Your Teenager's Instant Messaging," The TechStrategy™ Report, Forrester Research, Inc., February, 2003).

<sup>22</sup> BellSouth Comments at 3, n.6

<sup>23</sup> See, e.g., Paul David, "CLIO and the Economics of QWERTY," AMERICAN ECONOMIC REVIEW: Papers and Proceedings, 1985 at 332-337.

<sup>24</sup> Faulhaber and Farber Comments at 4.

<sup>25</sup> See AOL Time Warner and Microsoft Press Release at <http://www.microsoft.com/presspass/press/2003/May03/05-29MSAOLSettlementPR.asp>, dated May 29, 2003

<sup>26</sup> Faulhaber and Farber Comments at 3-4; see also MCI Reply Comments at 2-3

<sup>27</sup> See Cathleen Moore, "Messaging Convergence," INFOWORLD, Vol 25, Iss. 16, Apr. 21, 2003 at pp. 27-28.

objective for communications services, bringing consumer benefits of increased choice, lower prices, improved service, and new product offerings.<sup>28</sup> With the removal of the IM condition, AOL Time Warner will be able to offer new and innovative AIHS services and provide competitive choices to the marketplace at lower prices.<sup>29</sup> Removal of the condition will benefit consumers by enhancing competition among firms providing AIHS services, including AOL's primary competitors, MSN and Yahoo!, through the addition of a third significant competitor to the AIHS market.<sup>30</sup> Competition will also likely accelerate the pace of innovation for IM services. At present, MSN and Yahoo!, are already offering AIHS services to consumers in the form of IM-based video chat services.<sup>31</sup> AOL's experience and history of innovation in the IM market suggests that its own AIHS product could result in an AIHS offering with significant values for consumers, including both improved quality and features associated with video chat as well as the potential for new uses of AIHS services, such as the streaming or delivery of pre-packaged video content.

13 Such innovation would provide greater choice and functionality to IM users and also could reasonably be expected to stimulate competitive responses by Yahoo!, Microsoft, and other IM providers. By stimulating innovation in the AIHS market, removal of the condition will also contribute to another of the Communications Act's and the Commission's primary policy objectives, stimulating broadband deployment and usage.<sup>32</sup> Since AIHS services can be most effectively provided via broadband facilities, the provision of new AIHS services could contribute to consumer demand for broadband services, which may in turn strengthen incentives for companies to bring broadband services to all areas of the country.<sup>33</sup> These public interest benefits of competition, innovation, and increased broadband deployment and usage are likely to be accelerated if AOL Time Warner is permitted to compete against the established providers of AIHS service rather than be subject to the continued application of the IM condition.

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<sup>28</sup> See, e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eighth Report, WT 02-379, FCC 03-150, at ¶ 13 (rel. July 14, 2003) (enhanced competition benefits consumers directly with increased choice, innovative service, and new technologies), *National Systems & Research Co.*, 17 FCC Rcd 12011 (2002) (benefits of competition for consumers include lower prices, innovation, and additional service options).

<sup>29</sup> See Petition at 5-6, 29

<sup>30</sup> The Commission has found that introduction of a third competitor into a given market with two existing competitors can result in significant benefits for consumers. See, e.g., *Amendment of the Commission's Space Station Licensing Rules and Policies*, FCC 03-102 ¶ 64 (rel. May 19, 2003) (discussing benefits of a three firm market and presumption against three to two mergers and citing *FTC v H J Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001)).

<sup>31</sup> See Petition at 5, 22-24, Yahoo! Messenger SuperWebcam at <http://messenger.yahoo.com/messenger/superwebcam/>, viewed May 15, 2003, MSN Messenger Service at <http://messenger.msn.com/>, viewed May 15, 2003.

<sup>32</sup> See Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002).

<sup>33</sup> See, e.g., Kevin Werbach, "Digital Tornado: The Internet and Telecommunications Policy," OPP Working Paper No. 29, at 5 (Mar 1997) (finding that supply of high-capacity networks increases demand for bandwidth-intensive (broadband) services, and demand creates the need for additional capacity, resulting in a continuous "Internet feedback loop" or "spiral" of supply and demand)

14. For these reasons, we conclude that AOL Time Warner has provided clear and convincing evidence that imposition of the condition in question no longer serves the public interest, convenience, or necessity because there has been a material change in circumstances from the market conditions that existed at the time of the *Order*. Thus, we hereby grant the relief requested by AOL Time Warner and remove the restriction on its provision of video streaming AIHS services.

#### IV. ORDERING CLAUSES

15 Accordingly, having reviewed the AOL Time Warner Petition for Relief from the Instant Messaging Condition and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petition filed by AOL Time Warner Inc., Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

## STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee; CS Docket No 00-30.*

Today we adopt an Order removing a condition, imposed pursuant to the Commission's approval of the AOL Time Warner merger, relating to the provision of advanced instant messaging-based high-speed video services ("AIHS") by AOL Time Warner. As I explained in my separate statement to the AOL Time Warner Order,<sup>1</sup> I disagreed with the decision to impose the condition at that time, and subsequent events have confirmed the analysis set forth in my statement. I therefore wholeheartedly support the decision to remove the AIHS condition.

In my separate statement to the AOL Time Warner Order, I wrote that the majority's decision to impose the condition was faulty for several reasons. That the Commission strayed out of its core competencies in its analysis of instant messaging should now be clear. As I noted in my statement, the Commission provided no clear market definition, used inconclusive market share data, and relied upon a flawed "tipping" analysis with respect to instant messaging.<sup>2</sup>

We now have two-and-one-half years of evidence that the market is not tipping. The fact that AOL Time Warner's market share is decreasing in a growing market, combined with the fact that two non-trivial competitors -- Microsoft and Yahoo -- have established stable and growing market shares, directly contravenes the theory that the market is tipping toward AOL Time Warner.<sup>3</sup> The Commission anticipated the possibility that its tipping analysis was flawed and included a provision for the company to petition the Commission to remove the condition.

I would underscore the procedural posture of the case. The Commission's fear in the AOL Time Warner Order was that the merged firm would dominate the broadband market through its AIHS application over broadband. Clearly that has not transpired. Yet the dissent stands for the proposition that broadband consumers still need the government to protect them from a company that is in a weaker competitive position today than when the condition was imposed.

Moreover, I would reject any suggestion in the dissent that the focus of today's Order is the possible public good inherent in interoperability for all IM providers. If IM interoperability is good public policy generally, it should be good for Yahoo, Microsoft, and other IM providers. Indeed the dissent exhibits a desire for a rule of general applicability when it calls for "an open Internet without

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<sup>1</sup> See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc and American Online, Transferors, to AOL Time Warner, Inc, Transferee*, 16 FCC Rcd 6547, 6700-14 (2001) ("Order"), *Separate Statement of Commissioner Michael K. Powell*.

<sup>2</sup> The analysis of instant messaging can be found in the *Order*, 16 FCC Rcd at 6603-30 ¶¶ 128-200.

<sup>3</sup> Even stable market shares would disprove tipping, because tipping is characterized by rapid growth in the largest market share, and rapidly declining market share for others. As I noted in my statement, the analysis was already undermined by developments in the market as the *Order* was being written. Two competitors (Yahoo! and Microsoft) had already gained substantial market share and were growing at a substantial rate

bottleneck controls," yet as I have stated repeatedly, FCC merger conditions clearly demand specificity to the transaction before us.<sup>4</sup> If a requirement is in the public interest generally, it should be required of all providers through a rulemaking. Regulators must resist using merger conditions to make policy that the agency is unable or unwilling to impose on the broader industry at large.

How much longer would the dissenters have us wait before agreeing that AOL Time Warner is not going to dominate AIHS?<sup>5</sup> For the past two and a half years, the United States government decided -- in the name of consumer protection -- to completely preclude one company from competing in a fast-changing high tech market and bringing more choice and innovation to consumers. Instead of supporting today's pro-consumer decision, however, the dissenters would continue this misguided central planning policy for the high tech industry. I marvel at the willingness of my dissenting colleagues to use the powerful levers of government to manipulate market outcomes in the complete absence of any actual harm to consumers.

Second, the lack of participation by affected parties speaks volumes. Neither Yahoo! nor Microsoft, the supposed beneficiaries of the condition, has argued to keep the condition. Similarly, consumer advocates did not file to argue that this condition is necessary to protect consumers. This lack of participation suggests to me that continued imposition of the condition is regulation for the sake of regulation with no clear purpose or public interest value.

Third, although AOL Time Warner did not need to show affirmative public interest benefits, only changed conditions, the public clearly will benefit by lifting the condition. Removal of the condition will benefit consumers through the addition of a third significant competitor to the AIHS market, furthering the Commission's policy goal of promoting competition in communications services. The dissent dismisses this pro-competition claim partly because "we have no assurance that removal of the condition will actually make the IM market more competitive in the future."<sup>6</sup> While the future can never be predicted with "assurance," there can be little doubt that competition will be enhanced when AOL Time Warner begins offering AIHS service to consumers in competition with Microsoft and Yahoo.

With the removal of the instant messaging condition, AOL Time Warner will be able to offer new and innovative AIHS services and provide competitive choices to the marketplace. AOL's experience and history of innovation with instant messaging suggests that its own AIHS product could result in an offering with significant value for consumers. Such innovation very likely will stimulate competitive responses by Yahoo!, Microsoft, and other instant messaging providers, all to the benefit of consumers.

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<sup>4</sup> See, e.g., *Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and Section 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules (CC Docket No. 98-141)*(Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part)("The conditions that are sought [in mergers] are more often surrogates for policies and rules of general, rather than merger-specific, applicability, but without the extensive deliberative process and the check of judicial review normally afforded a rulemaking.")

<sup>5</sup> Only two-and-one-half years are left before the condition expires on its own. Is it realistic to suppose that within that time a market will develop for AIHS, and AOL will still be able to use its vastly diminished position to dominate this market?

<sup>6</sup> Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, Dissenting, at 3.

By increasing innovation in the AIHS market, removal of the condition will also stimulate broadband usage and deployment, another objective of the Communications Act and the Commission. Since video streaming AIHS services can be provided most effectively via broadband facilities, the provision of new AIHS services could contribute to consumer demand for broadband services, which may in turn strengthen incentives for companies to bring broadband services to all areas of the country. These public interest benefits are much more likely with AOL Time Warner as a competitor in AIHS service, removal of the condition eliminates an artificial barrier of entry and likely will improve the performance of whatever market may develop.

While neither company has achieved the goal and potential public interest benefit of the condition, instant messaging interoperability, MSN and Yahoo! are clearly making headway in garnering market share in the AIHS market. Meanwhile, AOL Time Warner is prohibited from providing a competitive response to consumers over its broadband facilities as a direct result of the condition, and the hypothesized competitive harms from the combination of AOL's Internet services and Time Warner's content and broadband facilities have not materialized.

As MSN and Yahoo! take the lead in providing these new services, there is little incentive for them to achieve instant messaging interoperability with AOL Time Warner, since to do so would allow AOL Time Warner to enter the AIHS market. Thus, the consumer benefits from keeping the condition are unprovable, while the harms from retaining it are, at least to the majority, painfully apparent. I therefore support the action taken today

**STATEMENT OF  
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN,  
DISSENTING**

Re: *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. Transferors, to AOL Time Warner Inc., Transferee; CS Docket No 00-30*

We respectfully dissent from the decision to eliminate the requirement that AOL Time Warner achieve interoperability with other providers of instant messaging (IM) services prior to offering new streaming video services through advanced IM. We believe that the petitioner, AOL Time Warner, has failed to meet its high burden of demonstrating by clear and convincing evidence that this requirement no longer serves the public interest due to a material change in circumstance.

In 2001, the Commission found that AOL was the dominant provider of instant messaging services, a platform that the Commission anticipated would become significant for launching and supporting other applications taking advantage of presence detection and real-time communication. At that time, AOL claimed it had 65 percent of the IM market, but that the shares of other competitors, including Microsoft and Yahoo!, were growing. While committing in principle to interoperability, the Commission found that America Online had consistently blocked efforts by others to interoperate. The Order concluded that the combination of America Online's IM dominance, coupled with network effects and resistance to interoperability, and Time Warner's content and high-speed distribution assets, would threaten the public interest in open and interoperable communications systems, the development of the Internet, consumer choice, competition and innovation.

To address potential public interest harms to consumers that could result from the combination of America Online's Internet assets and Time Warner's content and broadband distribution facilities, the Commission required AOL Time Warner, the dominant player in the market, to achieve interoperability with other IM market participants. In this manner, all consumers would benefit from an open Internet without bottleneck controls on the free flow of information

The condition specifically barred the merged company from offering an advanced IM-based streaming video service until it had achieved or contracted to achieve interoperability. The Commission, however, recognized that this was a nascent market, and therefore, provided that AOL Time Warner could seek relief from this condition by demonstrating that circumstances had changed such that the public interest is no longer be served by an interoperability condition. The Commission not only held that the burden was on AOL to justify elimination of the condition, but that it would have to meet the high burden of doing so through "clear and convincing evidence." The Order settled on a clear and convincing evidence standard to provide an avenue for relief, but with a significant evidentiary hurdle, thereby ensuring a detailed written motion and decision that would be sufficient to overcome the fact findings and predictive judgments in the Order that led to the public interest condition in the first place.

AOL Time Warner, in its petition, argues that circumstances have changed because its market share has dropped from over 60 percent to 58 to 59 percent and remained there for four consecutive months (although the share increased from the third to fourth month). Thus, AOL Time Warner argues that the market has not tipped and it is not dominant in the market. AOL Time Warner further argues that there is competition in the market and high demand elasticity because consumers can use multiple IM services essentially without cost.

Opponents of eliminating this requirement contend that AOL Time Warner has seen only a small erosion of market share and continues to dominate the market. They further contend that, because there has been a significant increase in business IM users for whom the network effects of the public IM network are not important, we need to focus on the consumer IM market for our analysis. They note, however, that AOL Time Warner provides only aggregated data, thus precluding useful conclusions about competitive effects within the consumer IM market. In addition, they worry that AOL Time Warner will use its position as market leader to extract supra-competitive rates from content providers that seek to reach its users. Finally, they argue that this requirement is even more important today because AOL Time Warner has only recently begun to market AOL Broadband for which advanced IM-based high-speed services are relevant.

We conclude that AOL Time Warner has failed to show by clear and convincing evidence the material change in circumstance that establishes that the condition no longer serves the public interest. While AOL Time Warner submits evidence that its market share eroded slightly over more than two years while competitors have increased market share, we cannot conclude that AOL Time Warner has made the requisite showing necessary to eliminate this condition nor that relief from the condition is a fair outcome for consumers.

Although the Commission's 2001 Order requires at a minimum that AOL Time Warner must demonstrate that it has not been dominant for four consecutive months, the majority conducts little economic analysis of the market to determine if AOL Time Warner remains dominant and if the predicted effects of the 2001 Order are not likely to occur. Today, as in 2001, AOL Time Warner is the market leader in IM services. AOL Time Warner continues to have a mass of users that is larger than all other providers combined. It continues to have significant high-speed distribution and content assets which could be incorporated into its IM services. The IM market may be more mature now than in 2001, at least with respect to narrowband, and AOL's market share may have eroded slightly, but the majority has not conducted the requisite analysis of these market changes and their implications for the public interest, convenience, and necessity. As such, any removal of the condition is premature and unwarranted.

The majority dismisses the opponents' argument that AOL Time Warner's market data is improperly aggregated. The majority ignores the opponents' unrebutted analysis, because it is not accompanied by independent, disaggregated data. In doing so, the majority fundamentally misallocates the burden of proof in this proceeding turning the standard on its head and dismissing any critique of AOL's petition that is the least bit incomplete, even if such critique raises substantial questions about the sufficiency of AOL Time Warner's petition. Without such information, there is even more reason to doubt whether AOL Time Warner, or the Commission, has effectively measured or appreciated the relevant market characteristics and their impact on the public interest.

Further, the majority's analysis is often inconsistent, particularly in its discussion of interoperability within the IM market. For example, since AOL's competitors have failed to interoperate, the majority assumes that they must believe that they are competitive in the IM market. In assessing AOL's failure to interoperate, however, the majority assumes that this failure was not the result of a strategic decision. The majority then presents evidence that Microsoft and AOL Time Warner settled litigation between the companies by agreeing to explore ways to establish interoperability between their IM networks, thereby refuting the majority's previous analysis.

Moreover, the Order also does not adequately analyze the public interest implications that might result from the removal of the condition. Perfunctory claims that increased competition is in the public

interest are simply not enough, especially when we have no assurance that removal of the condition will actually make the IM market more competitive in the future. Among other things, the Order fails to undertake a prospective market structure analysis or consider how removal of the condition will affect AOL Time Warner's ability to leverage its leading position in the IM market, IM interoperability, continuation of multi-IM services such as Trillian, or continuation of IM service offerings without subscription to another service. All could be potentially affected if AOL Time Warner is freed from this requirement. The Commission has no business voting to eliminate this public interest requirement until it at least addresses these critical questions.

In sum, we are unable to conclude on this record that the petitioner has carried its heavy burden of proof. As a matter of policy, the goal of open, interoperable Internet communications services justified this condition as serving the public interest, and nothing in the petition convincingly shows otherwise.